

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD DALE MCBRIDE, JR.,

Defendant-Appellant.

UNPUBLISHED

April 11, 2006

No. 259326

Bay Circuit Court

LC No. 03-010747

Before: Kelly, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age) and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). The trial court sentenced defendant to concurrent terms of 135 to 300 months' imprisonment for the CSC I conviction and 115 to 180 months' imprisonment for the CSC II conviction. We affirm.

Defendant contends that the trial court erred in denying his motion for new trial predicated on an ineffective assistance of counsel claim. We disagree. We review a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

To establish that he was denied the effective assistance of counsel, defendant must show "that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must overcome the presumption that his counsel was employing sound trial strategy under the circumstances. *Id.* To establish the requisite prejudice, defendant must show a reasonable probability that defense counsel's errors were outcome determinative. *Id.* at 302-303.

Defendant first argues that defense counsel did not adequately investigate prior allegations of two juveniles molesting the victim. We disagree. The record clearly shows that defense counsel was aware of these allegations and attempted to investigate and use this

information. Defense counsel testified at the *Ginther*¹ hearing that he interviewed someone who had heard a conversation in this regard, but the individual did not remember anything about it. Further, defense counsel informed the trial court that, if he were allowed to pursue this matter at trial, he would argue that the charges against defendant were raised, in part, as an attempt to draw suspicion away from the juveniles. The trial court excluded all evidence along these lines. Under these circumstances, defense counsel's performance cannot be characterized as objectively unreasonable.

Defendant also argues that defense counsel was ineffective for failing to file a motion to quash on the basis of insufficient identification at the preliminary examination. We disagree. At the *Ginther* hearing, defense counsel stated,

I did not think [a motion to quash] would be successful and did not want to spend the family's money on a motion that I was sure was gonna be a loser . . . because while she backtracks in her testimony at the preliminary exam she did say some things on direct exam that were adequate enough for the judge to bind her over . . .

At a preliminary examination, the determination is "whether a crime has been committed and whether there is probable cause for charging the defendant with that crime," *People v Harris*, 190 Mich App 652, 657; 476 NW2d 767 (1991), the prosecution need not establish guilt beyond a reasonable doubt, *People v Fiedler*, 194 Mich App 682, 693; 487 NW2d 831 (1992). After reviewing the preliminary examination record, we agree that the victim adequately explained, from behind a screen, that defendant was the perpetrator. This provided probable cause for binding defendant over. Defense counsel's decision not to file a motion to quash did not fall below objective standards of reasonableness because "defense counsel is not required to make motions that have no merit." *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant also argues that the trial court erred in denying his motion for a directed verdict when the victim failed to identify defendant as the person who touched her. We disagree. We review this issue de novo to determine whether the evidence, when viewed in a light most favorable to the prosecution, could support a finding that defendant is guilty beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Issues concerning witness credibility are left to the trier of fact. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885; 586 NW2d 925 (1998).

In this case, the victim testified that she knew defendant; she was at his house when he touched her in her private area. She also pointed to defendant identifying him. This testimony, viewed in a light most favorable to the prosecution and leaving credibility to the trier of fact, supports a finding that defendant was the perpetrator beyond a reasonable doubt.

Defendant also contends that the trial court erred in scoring offense variable (OV) 4 and OV 11 of the statutory sentencing guidelines. We disagree. We review the scoring assessment

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

of the trial court to determine if it “properly exercised its discretion and whether the evidence adequately supported a particular score.” *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

Defendant contends that there was no evidence to support a finding of “serious psychological injury” under OV 4. Ten points are properly scored for OV 4 if a victim suffered serious psychological injury that may require professional treatment. MCL 777.34(2). At the preliminary examination, the victim required the use of a screen and the presence of her father for support while she testified. At trial, the victim testified that it scared her to look at defendant and that she was nervous. The trial court also noted that the victim intended to seek psychological counseling and that she remained fearful at trial. Therefore, the trial court did not abuse its discretion in scoring ten points for OV 4.

Defendant also contends that OV 11 was improperly scored when there was only evidence of one penetration – the cunnilingus for which defendant was convicted. OV 11 provides that 25 points should be scored if one sexual penetration occurred. MCL 777.41(1)(b). The statute further provides:

All of the following apply to scoring offense variable 11:

- (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
- (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 and 13.
- (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense. [MCL 777.41(2).]

MCL 750.520a(o) defines sexual penetration as including “cunnilingus . . . or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body”

Although somewhat unclear regarding the exact events, the victim’s testimony nonetheless supports the scoring of 25 points for OV 11. The victim testified that defendant touched her in her private area with his hand and tongue. After this penetration, the victim turned over onto her stomach, at which point defendant touched her buttocks. The victim then turned over onto her back again. When she returned to this position, defendant touched her “by” her private area “again,” although she was not sure whether it was with his hand or tongue. She also stated that, when defendant touched her with his tongue, he was “licking” her. The victim’s description of “by” her private area was sufficient for a finding of “any intrusion, however slight” into her genital area, despite her testimony that defendant’s tongue or hand never went “into” her private area. Furthermore, although the victim stated that she was unsure of whether defendant used his tongue when she turned back over, her testimony leaves the possibility that he did use his tongue to lick her private area, thus committing a second act of cunnilingus. Therefore, for the purpose of scoring OV 11, the evidence supports a finding that, after the first

penetration, on which the conviction was based, there was a second penetration “arising out of the sentencing offense,” which occurred when the victim turn over onto her back again. Therefore, the trial court did not err in scoring 25 points for OV 11.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Michael J. Talbot